COPY

Supreme Court, U. S.
FILED
OCT 10 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-380

F. J. PERILLO and RUTH E. PERILLO, husband and wife,
Petitioners,

vs.

UNITED AMERICAN LIFE INSURANCE COMPANY,
a Colorado corporation,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

JOHN G. STOMPOLY,
JOHNSON, HAYES, MORALES & STOMPOLY,
1100 Transamerica Title Building,
Tucson, Arizona 85701,

SIDNEY WEISSBERGER,
509 Lawyers Title Building,
Tucson, Arizona 85701,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

Page

Reply to plaintiff's argument IV B (pp. 11, 12, 13, 14, 15) 2

1. The court had no power to keep this foreclosure decree under its control after a sale was conducted except to determine, if Perillos were liable for a deficiency as provided by § 33-727 Arizona Revised Statutes 2

2. The court lacked the power to enter a deficiency against the Perillos 3

A. Without allegations in the complaint that the Perillos were either the mortgagors or had assumed the mortgage debt, the court had no power to enter any form of judgment against the Perillos equivalent to a deficiency 3

C. Section 33-727 limiting deficiency judgments against a mortgagor personally served should be upheld, regardless if the judgment is termed a deficiency or on the note 4

Reply to plaintiff's argument IV C (pp. 15 and 28) 4

The Perillos could not in the federal court in this diversity suit have a judgment entered against them, after the foreclosure decree and sale 4

The note did not provide for payment of the obligations sought to be recovered under this second judgment 5

5. No discharge because Sep. 11, 1968 agreement did not contain express provision for a "deficiency judgment" 6

7. The receivership 7

Conclusion 8

Table of Authorities Cited

Cases	Pages
Angel v. Bullington (1947) 330 U.S. 183, 67 S.Ct. 657, 91 L.ed. 832	4, 8, 9
Arizona Title Insurance and Trust Co. v. Kelly (1970) 11 Ariz. 254, 463 P.2d 838	5
Catchpole v. Narramore, 102 Ariz.2d 248, 428 P.2d 105 (Ariz. 1967)	5
Connolly v. Great Basin Insurance Co., 431 P.2d 921, 6 Ariz.App. 280	7
Engler v. Sainer, 417 P.2d 925, 4 Ariz.App. 116	7
Greater Arizona Savings and Loan v. Gleeson, 5 Ariz.App. 577, 429 P.2d 464	6
Kastner v. Fashion Livery Co. (1906) 10 Ariz. 23, 85 P. 120	3
Windfoot California Homes v. Valley National Bank (1952) 74 Ariz. 287, 248 P.2d 738	7

Rules	
Federal Rules of Civil Procedure, Rule 54(b)	3, 4

Statutes	
Arizona Revised Statutes:	
Sections 33-722	2
Sections 33-725	2, 5
Sections 33-727	2, 4

Texts	
28 Am. Jur. 2d, Section 130, p. 771	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-380

F. J. PERILLO and RUTH E. PERILLO, husband and wife,
Petitioners,

VS.

UNITED AMERICAN LIFE INSURANCE COMPANY,
a Colorado corporation,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

There are material misstatements and omissions of fact and law in respondent's brief, as shown in petitioners' reply brief to the United States Court of Appeals, as follows:

REPLY TO PLAINTIFF'S ARGUMENT IV B
(pp. 11, 12, 13, 14, 15)

1. THE COURT HAD NO POWER TO KEEP THIS FORECLOSURE DECREE UNDER ITS CONTROL AFTER A SALE WAS CONDUCTED EXCEPT TO DETERMINE, IF PERILLOS WERE LIABLE FOR A DEFICIENCY AS PROVIDED BY § 33-727 ARIZONA REVISED STATUTES.

Plaintiff made an incorrect statement at p. 12 of its brief:

> "The trial concluded, after considering extensive briefs submitted by both parties, that Plaintiff's claim against the Perillos was not barred by the cited sections because it was based upon an indebtedness evidenced by a writing signed by the Perillos, i.e.: a promissory Note (CL 11, R 1069) . . ." (Cited Sections were 33-725 and 727.)

Conclusion 11 (R. 1069) stated:

> "Plaintiff's claim against the Perillos is based upon an indebtedness evidenced by a writing signed by the Perillos, i.e., a promissory, *and the Arizona Statute of Frauds is inapplicable to Plaintiff's claim.*"

One of Perillos' affirmative defenses was the Statute of Frauds barred charges arising out of the Realty Mortgage, being "debts and miscarriages of another," not agreed to be paid by a writing signed by the Perillos. (R. 977.) Conclusion of Law 11 overruled this defense of Statute of Frauds. It did not rule on Perillos' defense, not being mortgagors they were not liable for a deficiency. No *reasons were assigned by the District Court for Conclusion 9, holding §§33-722, 725 and 727 did not bar or defeat Plaintiff's claim. The Court did not rule on other Perillos' defenses:*

non-liability of a nonmortgagor for a deficiency or its equivalent; merger, Plaintiff's attempt to avoid Arizona Deficiency Judgment Statute; the bid price exceeded Perillos' liability on the Note; election of remedies; and in a diversity suit Plaintiff's claim against Perillos does not lie in the Federal Court.

Plaintiff states Conclusion of Law 14 was not disputed by appellant, but at p. 5 of its brief states: "They are contending that the trial court erred in certain Conclusions of Law, namely Nos. 5, 7, 8, 9, 10, *14* and 15." A.O.B. is replete with arguments (none answered by Plaintiff) that the judgment shows Conclusion 15 was an attempt by Plaintiff for Perillos to pay a deficiency, including Receiver's Fees, interest on interest, realty taxes, and attorney's fees to foreclose the mortgage, all charges never agreed to be paid by them. *For the first time and now on this appeal Plaintiff claims Rule 54(b) of Federal Rules of Civil Procedure permits this second judgment.* No authorities are cited to support this new theory. There are none.

---

2. THE COURT LACKED THE POWER TO ENTER A DEFICIENCY AGAINST THE PERILLOS.

A. Without allegations in the Complaint that the Perillos were either the Mortgagors or had assumed the mortgage debt, the Court had no power to enter any form of judgment against the Perillos equivalent to a deficiency.

Plaintiff did not answer *Kastner v. Fashion Livery Co.* (1906) 10 Ariz. 23, 85 P. 120 (pp. 18 and 19 of A.O.B.), which always sought a deficiency and in

post-trial brief admitted it was requesting the equivalent of a deficiency. (R. 997, p. 21 of A.O.B.) It does not dispute the Court refused the first request to construe together the Note and Mortgage; never requested a Finding or Conclusion to that effect.

C. Sec. 33-727 limiting deficiency judgments against a mortgagor personally served should be upheld, regardless if the judgment is termed a deficiency or on the Note.

Plaintiff does not answer (pp. 21, 22 and 23 of A.O.B.) holding, if a person is not liable for a deficiency under a statute similar to 33-727, a judgment in the same sum as a deficiency claim cannot be recovered against persons in the category of Perillos, exempt from the deficiency claim. Plaintiff, realizing the Court's error, has a new theory: Rule 54(b) gave the Court power to enter this second judgment. As shown, this new theory cannot validate this second judgment.

REPLY TO PLAINTIFF'S ARGUMENT IV C (pp. 15 and 28)
THE PERILLOS COULD NOT IN THE FEDERAL COURT IN THIS DIVERSITY SUIT HAVE A JUDGMENT ENTERED AGAINST THEM, AFTER THE FORECLOSURE DECREE AND SALE.

Plaintiff does not dispute *Angel v. Bullington* (1947) 330 U.S. 183, 67 S.Ct. 657, 662, 91 L.ed. 832, holding limitations on deficiencies by state statutes are substantive rights granted to its citizens, so respected by Federal Courts in diversity suits. The District Court by this second judgment deprived the Perillos, citizens of Arizona, of a fundamental right

given to them by their State: freedom from a deficiency claim arising out of a foreclosure because they were non-mortgagors. It is the power of the States to deal with mortgages made by its citizens within its State. (Tenth Amendment to the United States Constitution.)

Appellee (p. 28) stated §§ 33-725 and 727, Arizona Deficiency Judgment Statute, is procedural, controlled by Federal law, and the District Court's interpretation. Arizona Supreme Court in *Catchpole v. Narramore,* 102 Ariz.2d 248, 428 P.2d 105 (Ariz. 1967), held to the contrary, ruling California Deficiency Judgment Statute was a substantive right to be respected by the Arizona Courts, because it did not govern applicable procedures, but disregarded liabilities.

Arizona Title Insurance and Trust Co. v. Kelly (1970), 11 Ariz. 254, 463 P.2d 838 is not analogous and supports the Perillos *because no foreclosure decree was ever entered.* A Motion for Summary Judgment was granted dismissing the Complaint for improper joinder of co-maker. To avoid a multiplicity of suits, plaintiff had joined the co-maker, non-mortgagor, in the foreclosure suit, *because the mortgagor had denied the validity of the mortgage.*

The Note did not provide for payment of the obligations sought to be recovered under this second judgment.

Plaintiff does not answer the arguments on pp. 31 and 32, A.O.B., particularly "this court should not rewrite an agreement for the benefit of this plaintiff."

(p. 32, A.O.B.) Perillos were never liable for atto
ney's fees to foreclose, interest on interest, receiver
fees and expenses to operate a bar and real esta
taxes (facts not disputed by plaintiff) because th
never agreed to pay these charges. There is no bas
for plaintiff's statement that the judgment is "t
balance due on the Note." (Plaintiff adopted a pri
position prior to trial (R. 502 to 504).) Uncontr
dicted arithmetic shown on pp. 32 and 33 of A.O.
establishes the bid price exceeded Perillos' liabilit
under the Note, causing it to be paid as to the Perillo
Plaintiff admitted Conclusion 14 is one of the co
clusions claimed by Perillos to be in error. (p. 5
Brief of Appellee.)

**5. No discharge because September 11, 1968 agreement[2] d
not contain express provision for a "Deficiency Judgment**

Plaintiff's arguments (including the approval
the judgment as to form) to avoid *Greater Arizon
Savings and Loan v. Gleeson*, 5 Ariz.App. 577, 42
P.2d 464, were analyzed in said opinion, except plain
tiff's new theory—*the judgment prepared by it di
charged the Perillos, but since it was the trial Court'
error, not plaintiff's, it can still proceed on the Not
(P. 26.) If plaintiff was not satisfied with this judg
ment (the Court followed all of plaintiff's requeste
Findings of Fact and Conclusions of Law (R. 937 t
952)), it should have appealed.

No estoppel can be invoked against the Perillo
because estoppel was not pleaded in plaintiff's claim

[2]Apparently a typographical error as plaintiff undoubtedl
intended to state "Judgment."

Connolly v. Great Basin Insurance Co., 431 P.2d 921, 6 Ariz.App. 280; there is no showing plaintiff relied upon any act of Perillos or was damaged thereby. Estoppel does not apply because Perillos were under no duty to speak. 28 Am. Jur. 2d 771, Sec. 130, and plaintiff neither pleaded nor showed it did any act to its detriment relying upon any conduct of the Perillos. *Engler v. Sainer*, 417 P.2d 925, 4 Ariz.App. 116.

7. The Receivership.

Plaintiff does not dispute "7". (P. 12 of A.O.B.)[1] Estoppel cannot be claimed against Perillos for Receiver's charges and expenses in view of Plaintiff's statement to the Court seeking the appointment:

---

[1]**8. The Receivership.**

The Order appointing the Receiver provided for the operation of "a bowling alley restaurant and bar" (R. 102).

No mention was made in the Note or Mortgage granting to plaintiff the right to operate a bowling alley. All advances made to the Receiver were solely for the benefit of this plaintiff to operate the bowling alleys and a bar. The Receivership was wholly unrelated to the Note. The Perillos did object to Receivership expenses by their Answers, denying any claim for deficiency and in their Motion for Summary Judgment claiming no liability on their part for Receivership expenses. There is no finding of the net amount of the Receivership expenses for which the "plaintiff insists" in crediting the proceeds of the bid price (Finding of Fact No. 27; R. 1066).

No estoppel can be invoked against Perillos for plaintiff's advances to the Receiver because (1) Perillos denied liability in their answer and motions for summary judgment and (2) the advances were made for plaintiffs' benefit to protect their security, not relying upon any act of Perillos; and (3) *the Court had no jurisdiction to appoint a Receiver, the foreclosure related to a parcel of real estate, not a bowling alley or bar. Windfoot California Homes v. Valley National Bank* (1952) 74 Ariz. 287, 248 P.2d 738; (4) no loss is shown from the Receiver's operations, all of which inured to the benefit of plaintiff; (5) plaintiff in the note never agreed to pay charges for a liquor license and repair a bowling alley.

> "The revenue derived by the Receiver should be enough to pay costs of the Receivership and necessary expenses to keep the establishment in business." (R. 64.)

Plaintiff now claims "alter ego", a new theory. Perillos were not "the sole owners of Diamond" (p. 2 of appellees' brief), being the stockholders of this bona fide Arizona corporation, which received all the proceeds of Plaintiff's mortgage loan. Finding of Fact 13, (R. 1056, 1057.)

CONCLUSION

The Writ should be granted because Respondent has not denied the relief granted to it was equivalent to a deficiency judgment, thereby making this judgment an illegal circumvention of the 10th Amendment, *Angel v. Bullington* and the Anti-Deficiency Judgment Statute of Arizona. Each point before this Court was raised in the District Court and the United States Court of Appeals for the Ninth Circuit.

Respondent admits Arizona courts would neither have jurisdiction nor power to enter a deficiency judgment. There is in this case a vital public question involving citizens of all states. Is the 10th Amendment meaningless in foreclosure suits filed in the Federal courts involving diversity jurisdiction and deficiencies? Can such Federal Court grant the equivalent of a deficiency, not a favorite in law, if the applicable Arizona law withheld such right? To

be free from a deficiency is an Arizona substantive and not procedural right given to these petitioners and taken away by this Federal Court judgment overruling the 10th Amendment and *Angel v. Bullington.*

Dated, Tucson, Arizona,
October 5, 1972.

Respectfully submitted,
JOHN G. STOMPOLY,
JOHNSON, HAYES, MORALES & STOMPOLY,
SIDNEY WEISSBERGER,
Attorneys for Petitioners.